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Supreme Court of the United States

October Term, 1941

No. 331

In the Matter of the Application
of
THE MORRIS PLAN INDUSTRIAL BANK OF NEW YORK
Petitioner-Appellant
against

MARK GRAVES, OGDEN J. ROSS and JOHN P. HENNESSEY, as and constituting the State Tax Commission of the State of New York
Respondents-Appellees

to review a determination made under Article 9-A of the Tax Law

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BRIEF IN ANSWER TO STATEMENT OF APPELLEES OPPOSING JURISDICTION AND TO MOTION OF APPELLEES TO DISMISS OR AFFIRM

R. Randolph Hicks
Counsel for Petitioner-Appellant

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to review a determination made under Article 9-A of the Tax Law.

BRIEF IN ANSWER TO STATEMENT OF APPELLEES OPPOSING JURISDICTION AND TO MOTION OF APPELLEES TO DISMISS OR AFFIRM

Preliminary Statement

This is an appeal under Section 237(a) of the Judicial Code of the United States as amended (28 U. S. C. A. § 344(a)) and Section 1 of the Act of Congress, January 31, 1928 (c. 14, 45 Stat. 54), as amended by the Act of Congress of April 26, 1928 (c. 440, 45 Stat. 466), which provide that the Supreme Court of the United States may

review, upon appeal, a final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

Respondents-appellees have filed a statement under Rule 12(3) of the Revised Rules of the Supreme Court of the United States, contesting the jurisdiction of this Court, and have also moved under said Rule to dismiss or affirm. Inasmuch as the statement and motion are addressed to the Jurisdictional Statement of petitioner-appellant, and since the Jurisdictional Statement sets forth in detail the proceedings which were had in the state courts and the grounds upon which the appellant relies to establish jurisdiction in this Court, appellant will not again describe such proceedings and grounds in this brief but will refer to its Jurisdictional Statement for an account thereof.

POINT I

The appellant has obtained a final judgment in the highest court of New York in which a decision in this suit could be had.

The appellees, in their statement opposing jurisdiction (pp. 2-3), assert that there has been no determination in this case by the highest court of the State. The appellees base this assertion upon the ground that the appellant, in addition to serving and filing a notice of appeal to the Court of Appeals from the order of the Appellate Division confirming the determination of the State Tax Commission, also moved in the Court of Appeals and in the Appellate Division for leave to appeal to the Court of

Appeals,[1] and that the appellant's motions were denied. The appellees contend that the appellant should have pursued its appeal to the Court of Appeals as of right, and that until the appellant has done so there can be no final judgment or decree of the Court of Appeals from which the appellant can appeal to this Court.

It is true that the Court of Appeals has frequently denied a motion for leave to appeal to said Court on the ground that an appeal lay as of right. However, in this case it cannot be contended that the order of the Court of Appeals denying appellant's motion for leave to appeal was based upon the ground that appellant should have appealed to said Court as of right, for such was demonstrably not the fact.

The Court of Appeals denied appellant's motion on April 17, 1941 (Jurisdictional Statement, Exhibit C). On June 9, 1941, the appellant moved in the Court of Appeals for an order:

> "(1) allowing reargument of the petitioner-appellant's aforementioned motion in the Court of Appeals for leave to appeal to said Court of Appeals; and

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[1] That the appellant followed approved practice in so proceeding may be seen from the following passage from Cohen on The Powers of the New York Court of Appeals. Mr. Cohen, secretary to Judge Lehman, in his discussion of the statutory provisions governing appeals as of right, to which the appellees refer in their statement opposing jurisdiction (p. 2) says:

> "Since they are of relatively recent origin, the decisions interpreting them have not been many; and there is the further difficulty that many of these decisions have been without opinion. Consequently the body of law regarding appeal as of right by virtue of a constitutional question is fragmentary; and no conclusions concerning it can be made with complete confidence. The case is a rare one where an appellant is safe in relying only on the provisions permitting appeal on constitutional questions, in order to bring his case before the court of appeals. The precaution of a motion for leave to appeal, made simultaneously, is generally wise; although of course it does not guarantee that the case will reach the court of appeals" (p. 158).

"(2) upon such reargument, amending the said order of the Court of Appeals, dated April 17, 1941, so that the same will indicate whether or not the said motion for leave to appeal was denied on the ground that the petitioner is entitled to appeal to the Court of Appeals as of right;"

The notice of motion was dated June 2, 1941 and is annexed to this brief as Exhibit A.

The affidavit of Harold H. Kissam (annexed to this brief as Exhibit B), annexed to said notice of motion, clearly pointed out to the Court of Appeals the reasons why relief was desired (pp. 16, 21). In said affidavit Mr. Kissam explained the position of the appellant in the following language:

"Petitioner's dilemma arises from the fact that this Court, in denying leave to appeal, did not indicate whether such denial was on the ground that petitioner was entitled to appeal as of right, or whether it was on the ground that such appeal of right did not exist and further review was deemed unnecessary.

• • •

"As a result, petitioner cannot tell whether its remedies in the courts of this State are now exhausted, so as to entitle it to appeal to the United States Supreme Court (U. S. Code, Title 28, § 344[a]), or whether—as seems more probable—petitioner still has pending an appeal as of right to this Court. If the latter situation obtains, petitioner cannot now proceed in the United States Supreme Court, but must go forward with its appeal to this Court. If, on the other hand, petitioner should prosecute such appeal and this Court should subsequently dismiss the same on the ground that it does not lie, petitioner would lose all right to go to the high court in Washington because the time limit for proceedings therein (U. S. Code, Tit. 28, § 350) will then have expired.

> "It follows that petitioner may be seriously prejudiced unless this Court indicates the ground upon which it made its order of April 17, 1941, Exhibit C hereto" (pp. 16, 21).

On June 19, 1941 the Court of Appeals ordered that the aforesaid motion of the appellant for reargument and for an amendment to the prior order of the Court of Appeals be denied, but nevertheless, in said order of June 19, 1941 (Jurisdictional Statement, Exhibit D), made the following statement:

> "Denial of original motion was not based upon the ground that the appeal lies as of right."

Such a statement, in view of the prior proceedings in the case, and in the light of the explanations presented in the appellant's motion papers, does not admit of doubt or ambiguity. Clearly, the Court of Appeals meant thereby to indicate that appellant had exhausted its remedies in the state courts. The statement, given any other meaning, would have been useless, if not actually misleading, and clearly not responsive to the motion papers.

Appellees contend (p. 3 of their statement) that the above statement of the Court of Appeals should be interpreted as meaning that the appellant had an appeal as of right but that the Court of Appeals chose not to take any notice of such right in making its decision. Appellees cite no cases in support of such a strained and unnatural construction of the Court's language. Moreover, we submit that if the Court of Appeals had thought that the appellant should have pursued its appeal as of right, it would have so stated. This seems clear in view of the reasons which appellant had adduced for desiring the relief prayed for in its motion, and in view of the reliance which the Court of Appeals knew the appellant would place upon any language used in the Court's decision.

Furthermore, if the appellant had possessed an appeal as of right, the existence of such right would have been the easiest and most natural ground upon which the Court would have based its order.

Matter of Van Vliet, 224 N. Y. 545 (1918);
Matter of Fineman v. *Camp Ga-He-Ga*, 258 N. Y. 423 (1932);
Matter of Bradshaw v. *City of Schenectady*, 262 N. Y. 703 (1933),
G. A. Baker & Co., Inc. v. *Polygraphic Co. of America, Inc.*, 264 N. Y. 457 (1934).

It is evident, therefore, that the Court of Appeals, in its order of June 19, 1941, denied the appellant's motion for reargument, but in effect, by making the aforesaid statement, granted the appellant's prayer for the amendment of the prior order of April 17, 1941. It is, of course, well settled that an appeal may be taken from an intermediate appellate court of a state, where the highest court of the state has declined to exercise a discretionary review, even if the latter court expresses an opinion upon the merits.

American Railway Express Company v. *Levee*, 263 U. S. 19 (1923).

POINT II

This appeal presents a substantial federal question.

The appellees contend (pp. 4-5 of their statement), that the only issue involved is the construction of Section 219(p), subdivision 6 of the New York Tax Law, and of Articles III and VII of the New York Banking Law, and that upon such question the decision of the New York

courts is conclusive. To this argument several objections may be made:

1. It is well settled that while the Supreme Court will ordinarily follow the state court's construction of state statutes, the Supreme Court will always determine independently whether a statute, as so construed, violates any provision of the United States Constitution. As was said by Mr. Chief Justice TAFT, speaking for a unanimous court, in *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494 (1926), at 509:

> "It is true that the interpretation put upon such a tax law of a State by its Supreme Court is binding upon this Court as to its meaning; but it is not true that this Court, in accepting the meaning thus given, may not exercise its independent judgment in determining whether, with the meaning given, its effect would not involve a violation of the Federal Constitution."

2. Appellant, however, is also entitled to ask this Court to make an independent examination of the powers and business of industrial banks in the State of New York, in order to prevent the New York courts, by a mistaken and erroneous determination thereof, from depriving appellant of its substantial rights under the Federal Constitution. As was said in *Ward* v. *Love County*, 253 U. S. 17 (1920):

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. [Citing many cases.] Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579, 589. With this qualification,

> it is true that a judgment of a state court, which is put on independent non-federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof" (pp. 22-23).

In *Davis* v. *Wechsler*, 263 U. S. 22 (1923), this Court said, speaking through Mr. Justice HOLMES:

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* v. *Grand Lodge Knights of Pythias*, 225 U. S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way" (pp. 24-25).

The same Justice observed, in *Schlemmer* v. *Buffalo, Rochester, &c. Ry Co.*, 205 U. S. 1 (1907):

> "And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review" (p. 11).

And in *Stanley* v. *Schwalby*, 162 U. S. 255 (1896), the court said:

> "But, so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence" (pp. 278-279).

3. Even if the decisions of the New York courts were conclusive upon this Court, it goes without saying that the opinions of the Court of Appeals would prevail over any opinion of the Appellate Division. In *People ex rel. Morris Plan Co.* v. *Burke*, 253 N. Y. 85 (1930), the Court of Appeals held that an industrial or "Morris Plan" bank is a holder of "moneyed capital coming into competition with the business of national banks", on the ground that such banks do substantially a banking business. It will be noted that this decision was rendered before the 1937 amendments to the New York Banking Law, which abolished all remaining substantial distinctions between "Morris Plan" banks and state banks. The decision would therefore apply *a fortiori* now to such industrial or "Morris Plan" banks.

4. Appellees contend (p. 5 of their statement) that the constitutionality of the statutes involved is unquestionable, and cite a number of cases which merely stand for the proposition that a state may adopt reasonable classifications in its system of taxation. None of said cases involved discriminatory taxation of competing banks, and nothing contained in them is inconsistent with appellant's contention that discriminatory taxation of such banks, when they possess substantially identical powers and do a substantially identical business—when, in short, there is no basis for the discrimination either in differences between the banks or in the enunciated policy of the State—when, on the contrary, as appellant will show in its brief on the merits, the announced policy of the State has been to eliminate all distinctions between them —constitutes an unreasonable classification. In *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239 (1931), a case much more closely in point, Mr. Justice BRANDEIS, in speaking of a similar claim of violation of the equal protection clause, urged by a state bank and a national bank

which, pursuant to improper acts of state taxing officials, had both been subjected to discriminatory taxation in favor of competing moneyed capital, said:

> "Both petitioners claim that they have been subjected to intentional, systematic discrimination in violation of the equal protection clause of the Fourteenth Amendment. The federal right of the Central State Bank rests wholly upon that clause. It is assumed that there was such inequality of treatment as the Constitution prohibits. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 37; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 446; *Cumberland Coal Co.* v. *Board of Revision, ante*, p. 23. Compare *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 353" (p. 245).

(The Court held that the fact that the discrimination was perpetrated by state tax officials instead of the state legislature did not prevent the discrimination from constituting a violation of the equal protection clause.)

Such a statement, made by a Justice who never lightly assumed the unconstitutionality of any statute of a sovereign state, should be sufficient to establish at least such a question of unconstitutionality as to support the jurisdiction of this Court on appeal and to entitle the appellant herein to an argument on the merits.

POINT III

Appellees' statement should be disregarded and their motion denied for untimeliness.

Not only are the arguments of the appellees without merit, but their statement opposing jurisdiction and their motion to dismiss or affirm should not be considered by the Court at this time because such statement and motion were not served upon the appellant within the time speci-

fied by Rule 12(3) of the Revised Rules of the Supreme Court of the United States. Rule 12(3) provides:

> "Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. * * *"

Rule 7(3) of said Revised Rules provides in part:

> "A motion by appellee to dismiss an appeal will be received in advance of the court's ruling upon the jurisdictional statements only when presented in the manner provided by Rule 12, paragraph 3. * * *"

The appellant served the papers designated in Rule 12(2) of said Revised Rules upon the appellees herein on July 11, 1941. Appellant has been advised that the appellees filed their statement in opposition to jurisdiction and their motion to dismiss or affirm with the Clerk of this Court on July 26, 1941. However that may be, such statement and motion were not served upon the appellant until July 28, 1941, when the papers were received through the mails at the office of one of the attorneys for the appellant. It is true that under Rule 20(1)[2] of the

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[2] "Rule 20. *Mode of service of papers generally.*

"A notice or other paper in an action (other than a summons or other process, a paper to bring a party into contempt, or where the mode of service is specially prescribed by law) may be served on a party or an attorney either by delivering it to him personally or in the manner following:

"1. On a party or an attorney, through the post-office, by depositing the paper properly inclosed in a postpaid wrapper in a post-office or in any post-office box regularly maintained by the government of the United States in the city, village or town of the party or the attorney serving it, directed to the person to be served at the address within the state theretofore designated by him for that purpose; or, if such a designation has not been made, at his place of residence or the place where he keeps an office, according to the best information which can be conveniently obtained."

New York Rules of Civil Practice or under Rule 5(b)[3] of the Rules of the United States District Courts such service would have been timely. However, the Revised Rules of the Supreme Court of the United States nowhere expressly incorporate the rules of practice of either the state courts or the federal district courts; and there is no provision in the Rules of the United States District Courts making said Rules applicable to appeals from state courts to the United States Supreme Court. It would appear, therefore, that the statement and motion of the appellees herein are untimely and should not be received in advance of the Court's ruling upon the appellant's Jurisdictional Statement.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the statement of the appellees opposing jurisdiction and their motion to dismiss the appeal should not be received, or, in the alternative, that said motion should be denied.

Respectfully submitted,

R. Randolph Hicks,
Counsel for Petitioner-Appellant.

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[3] "Rule 5. *Service and Filing of Pleadings and Other Papers.* * * *

"(b) * * * Service by mail is complete upon mailing."

EXHIBIT A

Notice of Motion

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter
of
the Application of THE MORRIS PLAN INDUSTRIAL BANK OF NEW YORK,
Petitioner-Appellant,

against

MARK GRAVES, OGDEN J. ROSS and JOHN P. HENNESSEY, as and constituting the State Tax Commission of the State of New York,
Respondents.

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Harold H. Kissam, sworn to on the 2nd day of June, 1941, and upon the following further papers herein: (a) the printed record of proceedings; (b) the decision of the Appellate Division of the Supreme Court, Third Department, handed down November 20, 1940; (c) the order of confirmance of said Appellate Division, entered in the offices of the Clerks of said Court and of Albany County on December 2, 1940; (d) the notice of appeal of the petitioner-appellant dated, served and filed on January 14, 1941; (e) the order of said Appellate Division, entered in the office of the Clerk of said Court on March 7, 1941, denying the motion of petitioner-appellant for leave to appeal to the Court of Appeals from the said order of confirmance; (f) the printed papers of the petitioner-appellant on its motion in the Court of Appeals for leave

to appeal to said Court of Appeals and for leave to amend the said notice of appeal of January 14, 1941, and (g) the order of the Court of Appeals, dated April 17, 1941, and entered in the office of the Clerk of Albany County on April 22, 1941, and upon all of the proceedings heretofore had herein, the undersigned will move this Court at a Term thereof, to be held at the Court House of the Court of Appeals, in the City of Albany, State of New York, on the 9th day of June, 1941, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order:

(1) allowing reargument of the petitioner-appellant's aforementioned motion in the Court of Appeals for leave to appeal to said Court of Appeals; and

(2) upon such reargument, amending the said order of the Court of Appeals, dated April 17, 1941, so that the same will indicate whether or not the said motion for leave to appeal was denied on the ground that the petitioner is entitled to appeal to the Court of Appeals as of right;

and for such other, further and different relief as to the Court may seem just and proper.

Dated, New York, June 2, 1941.

Yours, etc.,

HAROLD H. KISSAM,
Attorney for Petitioner-Appellant,
Office & P. O. Address:
No. 56 East 42nd Street,
Borough of Manhattan,
City of New York.

To:

Hon. JOHN J. BENNETT, JR.,
Attorney General,
Attorney for State Tax Commission,
Respondents,
Albany, New York.

EXHIBIT B

Affidavit in Support of Motion

COURT OF APPEALS

OF THE STATE OF NEW YORK

In the Matter
of
the Application of THE MORRIS PLAN INDUSTRIAL BANK OF NEW YORK,
Petitioner-Appellant,

against

MARK GRAVES, OGDEN J. ROSS and JOHN P. HENNESSEY, as and constituting the State Tax Commission of the State of New York,
Respondents.

State of New York, }
County of New York, } ss.:

HAROLD H. KISSAM, being duly sworn, deposes and says:

I am the attorney for the petitioner-appellant above-named and I have personally conducted, and am thoroughly familiar with, all of the proceedings heretofore had herein.

I make this affidavit in support of an application (1) for reargument of a motion for leave to appeal to this Court, and (2) upon such reargument, for an amendment of the order of this Court, dated April 17, 1941, denying said motion for leave to appeal, so that said order shall

indicate whether or not leave to appeal was denied on the ground that petitioner-appellant is entitled to appeal to this Court as of right.

Such relief is requested in order to meet a technical jurisdictional problem with which petitioner-appellant is now confronted. The present application is similar in nature to the more usual application to amend a remittitur in order to clarify a ruling of this Court and to lay a foundation for further proceedings.

Two methods of procedure were followed by petitioner in this case: *first*, petitioner took a direct appeal to this Court on the theory that such appeal lay as a matter of right; and, *secondly*, petitioner applied in the Appellate Division and in this Court for leave to appeal. The second method of procedure has been terminated by denials of petitioner's applications; and if that ends the case, so far as the courts of New York are concerned, petitioner desires to appeal to the United States Supreme Court. If, on the other hand, the first procedure (direct appeal as of right) is indeed the proper one, then petitioner wishes to prosecute said appeal, and, if unsuccessful thereon, then to go to the Supreme Court of the United States.

Petitioner's dilemma arises from the fact that this Court, in denying leave to appeal, did not indicate whether such denial was on the ground that petitioner was entitled to appeal as of right, or whether it was on the ground that such appeal of right did not exist and further review was deemed unnecessary.

To understand the jurisdictional difficulties involved, we must review briefly the nature and history of this litigation:

This certiorari proceeding was commenced in the New York Supreme Court, Albany County, during April, 1940, to obtain review of a determination of the State Tax Commission (fols. 10-45).

On May 10, 1940, the proceeding was duly transferred for disposition to the Appellate Division, Third Department (fols. 5-9).

On November 20, 1940, said Appellate Division handed down a decision unanimously confirming the Tax Commission's determination (Printed motion papers in Ct. of Ap. on motion for leave to appeal, p. 49; 260 App. Div. 978). An order of confirmance was duly entered in the offices of the Clerks of said Appellate Division and of Albany County on December 2, 1940 (Printed motion papers, pp. 9-10).

Within the time prescribed by § 592 of the Civil Practice Act, to wit, on January 14, 1941, there was duly served and filed in the Albany County Clerk's Office a notice of appeal to this Court from the Appellate Division's said order of confirmance. A true copy of that notice of appeal is hereto annexed, marked "Exhibit A", and made a part hereof.

The notice of appeal (Exhibit A hereto) was served on the theory that petitioner-appellant was entitled to appeal to this Court as of right, pursuant to Subdivision 3 of § 588 of the Civil Practice Act.*

That the constitutionality of Article 9-A of the Tax Law, as applied to petitioner-appellant, was the sole question involved in the certiorari proceeding clearly appears from Exhibit 18 annexed to the amended return of re-

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* The relevant portion of said section reads as follows:

"§ 588. **Jurisdiction of the court of appeals in civil actions and proceedings.** Appeals may be taken to the court of appeals in civil actions and proceedings as follows: * * *

"3. As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state * * * under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court."

spondents (fols. 232-237). That exhibit consisted of a sworn statement by petitioner as to the ground of its claim and was, with respondents' consent, made a part of the formal record (fol. 233). The exhibit stated that the complaint of petitioner with respect to its taxation under Article 9-A of the Tax Law for the tax years 1937 and 1938 was predicated on the following single ground:

> "That the classification is unfair; that it is arbitrary and discriminatory and amounts to class legislation against industrial banks in contravention of Section 24 [now § 22] of Article 3 of the New York Constitution, and in violation of the Fourteenth Amendment of the Constitution of the United States in that it does not tax all banks doing all or substantially the same business in the same way * * *"

Petitioner's grievance, in brief, was as follows:

In and prior to 1937, the New York Legislature amended the Banking Law in several respects (see *e. g.*, L. 1931, ch. 490, 494; L. 1934, ch. 500; L. 1937, ch. 619, 888), with the result that commercial (state) banks and trust companies, on the one hand, were endowed with power to make industrial or "Morris Plan" loans, while, on the other hand, industrial banks, including petitioner, were authorized to engage in general commercial banking. Both types of banks availed themselves of the powers so given them. In and after 1937, therefore, state banks (covered by Article 3 of the Banking Law) and industrial banks (covered by Article 7 of said Law) were authorized to do, and actually did carry on, substantially the same businesses.

Despite this identity of the powers and businesses of institutions governed respectively by Articles 3 and 7 of the Banking Laws, industrial banks continued to be assessed, for franchise tax purposes at a rate of 6% of net income, whereas the rate assessed against state banks

and trust companies was only 4½%. Such inequality in taxation arose by virtue of the fact that the Legislature failed to make appropriate changes in the Tax Law to meet the altered circumstances.

The controlling provisions of the Tax Law had been enacted in 1926 and 1927, some ten years previously (L. 1926, ch. 286; L. 1927, ch. 477). They had placed "state banks, trust companies and financial corporations" in one category, subject to taxation under Article 9-B, and had left "investment companies" (which then included what are now known as industrial banks) in the category of "business corporations", subject to taxation under Article 9-A. Petitioner admits—and always has admitted—that when the respective classifications were thus established, there was ample ground therefor: that the powers and businesses of state banks were originally quite different from those of "investment companies."

Subsequently, however, when those differences were eradicated by the aforementioned amendments to the Banking Law, continued differentiation for purposes of taxation became—as petitioner contends—arbitrary, discriminatory and unconstitutional. This contention is founded on the elementary principle of constitutional law expressed as follows by Mr. Justice Brandeis in *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415:

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in conditions to which it is applied."

The specific provision of the Tax Law which, according to petitioner's contention, thus became invalid in view of the change in conditions to which it was applied, is Subdivision 6 of § 219-p of Article 9-B, reading as follows:

> "Notwithstanding the provisions of this article, all corporations of classes now or heretofore taxable

> under article nine-a of this chapter [*i. e.*, corporations such as petitioner] shall continue to be taxable under article nine-a."

As heretofore stated, petitioner duly served and filed a notice of appeal as of right from the order of the Appellate Division overruling petitioner's contention (Exhibit A hereto). And deponent respectfully submits that, in the light of the record showing petitioner's sole contention to have been based upon the constitutional objection to the validity of the Tax Law, petitioner was, and still is, entitled to maintain such appeal of right under Subdivision 3 of § 588 of the Civil Practice Act.

Moreover, said appeal of right was immediately perfected, as required by § 593 of the Civil Practice Act, for petitioner had previously, on April 11, 1940, duly filed and served an appropriate undertaking for costs. A true copy of said undertaking is hereto annexed, marked "Exhibit B", and made a part hereof.

Accordingly, it would appear that since January 14, 1941, there has been, and still is, pending in this Court an appeal by petitioner, as of right, from the Appellate Division's order of confirmance. Said appeal has not been heard, dismissed or otherwise disposed of.

Out of an abundance of precaution, your deponent deemed it inexpedient to rely solely upon petitioner's right of appeal under Subdivision 3 of § 588 of the Civil Practice Act. Accordingly, in March, 1941, deponent caused a motion for leave to appeal to be brought on before the Appellate Division, which motion was denied by that Court without opinion (printed motion papers, p. 50; 261 App. Div. 1018); and later a similar motion was brought before this Court for the same relief. The latter motion (to which was added a precautionary application for permission to amend the notice of appeal) was denied by this Court by order dated April 17, 1941. A true copy of

said order is hereto annexed, marked "Exhibit C", and made a part hereof.

The order (Exhibit C) does not indicate whether leave to appeal was denied because petitioner independently possessed a right of appeal, as was done, for example, in Albano *v.* Hammond (267 N. Y. 590), or whether the denial of leave to appeal was in the discretion of this Court, based on a holding that an appeal of right did not lie.

As a result, petitioner cannot tell whether its remedies in the courts of this State are now exhausted, so as to entitle it to appeal to the United States Supreme Court (U. S. Code, Tit. 28, § 344 [a]), or whether—as seems more probable—petitioner still has pending an appeal as of right to this Court. If the latter situation obtains, petitioner cannot now proceed in the United States Supreme Court, but must go forward with its appeal to this Court. If, on the other hand, petitioner should prosecute such appeal and this Court should subsequently dismiss the same on the ground that it does not lie, petitioner would lose all right to go to the high court in Washington because the time limit for proceedings therein (U. S. Code, Tit. 28, § 350) will then have expired.

It follows that petitioner may be seriously prejudiced unless this Court indicates the ground upon which it made its order of April 17, 1941, Exhibit C hereto.

Petitioner is ready, able and willing to proceed promptly with the appeal it has taken to this Court as of right, if, as seems to be the case, such appeal has properly been taken. In this connection, deponent respectfully wishes to point out that the appeal of the petitioner at bar is quite different from that which was passed upon by this Court in *Matter of Modern Industrial Bank* v. *Graves* (260 App. Div. 349; aff'd 285 N. Y. Mem. 156). The principal question, if not the only one, raised on the appeal in the *Modern* case was that of statutory construction. We, on the other hand, do not contest in

any way the scope or meaning of the taxing statute, but base our entire argument upon the ground that such statute, when applied after 1937 to this petitioner, was invalid and in violation of the fundamental rights assured to petitioner by the Constitution of this State and by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, deponent prays that the relief requested in the notice bringing on this motion be granted.

HAROLD H. KISSAM.

Sworn to before me this 2nd day of June, 1941.

ROBERT V. DAMIANO
Notary Public, Queens County
Queens Co. Clk's No. 3296 Reg. No. 3465
N. Y. Co. Clk's No. 702 Reg. No. 2D407
Commission Expires March 30, 1942

Exhibit A [to Affidavit]

(Not reprinted; same as Exhibit A to Jurisdictional Statement, except for omission of proof of service)

Exhibit B [to Affidavit]

NEW YORK CASUALTY COMPANY

Organized 1890

SUPREME COURT

COUNTY OF ALBANY

STATE OF NEW YORK

In the Matter

of

the application of the MORRIS PLAN INDUSTRIAL BANK OF NEW YORK for an order of Certiorari against Mark Graves, Ogden J. Ross and John P. Hennessey as and constituting the State Tax Commission of the State of New York.

WHEREAS, The MORRIS PLAN INDUSTRIAL BANK OF NEW YORK has applied or is about to apply for an Order of Certiorari to review the determinations of Mark Graves, Ogden J. Ross and John P. Hennessey, as and constituting the State Tax Commission of the State of New York, in fixing and affirming the tax of the Morris Plan Industrial Bank of New York under Article 9-A of the Tax Law, for the tax year beginning November 5, 1937 and ending November 5, 1938 and affirmed January 30, 1940.

NOW, THEREFORE, the NEW YORK CASUALTY COMPANY having an office and usual place of business at 26 Cliff Street, New York, N. Y., does hereby pursuant to the

Statute in such cases made and provided, undertake that it will pay all costs and charges which may accrue against the said MORRIS PLAN INDUSTRIAL BANK OF NEW YORK in the prosecution of the said order, including costs of all appeals in the above entitled proceeding, not exceeding the sum of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS.

Dated April 3, 1940.

NEW YORK CASUALTY COMPANY

By:
J. N. Apgar, Resident Vice President

Attest:
D. J. Owen, Resident Ass't. Secretary

370300 E

I hereby approve the within bond as to form and sufficiency.

Dated, New York City, April 11th, 1940.

JM
J. S. C.
Justice of the Supreme Court of
the State of New York.

Exhibit C [to Affidavit]

(Not reprinted; same as Exhibit C to Jurisdictional Statement)